No. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE ESTATE OF FLOYD COWARD
Petitioner,

versus

NICKLOS DRILLING COMPANY and
COMPASS INSURANCE COMPANY,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 27, 1991
CERTIORARI GRANTED DECEMBER 9, 1991

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United States Department of Labor,
Respondents

Nos. 89-4944, 90-1022

United States Court of Appeals
Fifth Circuit

March 29, 1991

Appeal was taken from decision of Benefits Review Board which affirmed award of Longshore and Harbor Workers' Compensation Act (LHWCA) benefits to

injured employee. In second action, employer petitioned for review of Benefits Review Board decision affirming award of LHWCA benefits to widow of employee killed in helicopter crash. The Court of Appeals, 907 F.2d 1552, 910 F.2d 276, vacated and remanded both cases. On further review of cases, consolidated on appeal, the Court of Appeals, en banc, held that LHWCA conditions eligibility for continuing benefits on employer's and employer's insurance carrier's prior written approval of any settlement between injured employee and third person for less than employee's LHWCA compensation settlement, regardless of whether employer or employer's insurer was paying LHWCA benefits at time of settlement.

Affirmed.

Politz, Circuit Judge, filed dissenting opinion in which King and Johnson, Circuit Judges, joined.

On Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before CLARK, Chief Judge, GEE*, POLITZ, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER and BARKSDALE, Circuit Judges.

PER CURIAM:

Today we sit en banc to resolve a conflict in the law of our Circuit. In the cases consolidated on this appeal, two panels of our Court held that section 33 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. Section 933 (1988), conditions eligibility for continuing LHWCA benefits on the

employer's and the employer's insurance carrier's prior written approval of any settlement between an injured employee and a third person for less than his LHWCA compensation entitlement; and we further held that this approval requirement applies regardless of whether the employer or the employer's insurer was paying LHWCA benefits at the time of settlement. See also Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644,647 (5th Cir.1986). In an unpublished opinion, Kahny v. Director, Office of Workers' Compensation Programs, 729 F.2d 777 (5th Cir.1984), a panel of our Court held the contrary: that section 33's approval requirement applies only if the employer or its carrier is paying LHWCA benefits at the time of the settlement.

Resolving this conflict, we now hold that the plain language of section 33 shows Congress' unambiguous intent to require prior approval whether or not the employer or its carrier was actually paying LHWCA benefits at the time of settlement. In the face of this manifest congressional intent, no administrative reinterpretation can be countenanced.

Background

In each case before us today, a person seeking LHWCA compensation for death or injury settled a related claim with a third person; and in each case, the settlement occurred at a time when the person was not receiving LHWCA benefits, was for less than the employee's compensation entitlement, and was consummated without the approval of

the employer or his carrier. In Nicklos Drilling Co. v. Cowart, 907 F.2d 1552 (5th Cir.1990), Floyd Cowart, an employee of Nicklos Drilling Company, sought LHWCA compensation for injuries he had received on Nicklos' drilling rig. At a time when Mr. Cowart was not receiving LHWCA benefits from Nicklos or its insurance carrier, he settled his claim against Transco Exploration Company, which owned the offshore platform that supported Nicklos' rig. In Petroleum Helicopters, Inc. v. Barger, 910 F.2d 276 (5th Cir.1990), Mary Barger, the widow of Walter Barger, sought LHWCA compensation for her husband's death. Mr. Barger died when the helicopter that he was piloting crashed. The helicopter was owned by his employer, Petroleum Helicopters, Inc.

(PHI), and manufactured by Bell Helicopter Textron. Ms. Barger settled her claim against Bell at a time when she was not receiving LHWCA benefits from either PHI or its insurance carrier. The panel opinions contain more detailed accounts of the facts.

Review of an Administrative Interpretation

Generally, the question before us is whether section 33 of the LHWCA permits any exception to its requirement that all settlements with third persons that leave the employer liable for further compensation benefits have the prior written approval of the employer and the employer's insurance carrier. Specifically, the Office of Workers' Compensation Programs (OWCP) urges us to

accept its in-house administrative interpretation that section 33 requires prior written approval only if the employer or its carrier is actually paying LHWCA benefits at the time of settlement. In Kahny we accepted OWCP's administrative interpretation, but in Collier, Nicklos Drilling, and Burger we rejected this interpretation.

In support of its position, the OWCP points out that section 33's purpose is to allow a person entitled to LHWCA benefits to receive those benefits and still pursue civil remedies against third persons. According to the OWCP, the predecessor to section 33 required an election of remedies and often caused severe financial hardship to individuals who chose to pursue civil action and

forego LHWCA benefits. OWCP argues that to alleviate this hardship Congress expressly eliminated election of remedies by enacting section 33 (a). Extending this argument, OWCP maintains that financial hardship can be avoided only by paying benefits during the pendency of a civil action; thus, settlements require prior written approval only if the employer or its carrier is actually paying benefits. The actual payment of benefits, according to OWCP, is the price which Congress intended employers to pay for the right of prior approval.

Second, OWCP maintains that section 33(g)(2) can be given complete meaning only if we accept OWCP's administrative interpretation. For convenience, we set out the relevant portions of section 33

here:

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employee is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less

than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer nd the employer's carrier, before the settlement is executed, and by the person entitled tc compensation (or the person's representative).

The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the

employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. Section 933(1988). OWCP argues that the language following the disjunctive "or" in section 33(g)(2) would be rendered partially meaningless if prior written approval of all settlements were always required, because the alternative of merely notifying the employer of such a settlement would have no function.

We begin our consideration of OWCP's

position by noting the Supreme Court's guidance in cases involving administrative interpretations.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an adminis-

trative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694 (1984) (footnotes omitted).

More recent, and more closely in factual point, is the Court's decision in Demarest v. Manspeaker, --U.S.--, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991), where the Court unanimously declined to give effect to a "longstanding administrative construction" in the face of clear statutory language granting witness fees to incarcerated state prisoners who testify

in federal court proceedings.

The Court of Appeals, while agreeing that the statutory analysis outlined above was "(o)n its face...an appealing argument," 884 F.2d (1343) at 1345 (10th Cir.1989), relied on longstanding administrative construction of the statute denying attendance fees to prisoners, and two Court of Appeals decisions to the same effect, followed by congressional revision of the statute in 1984.

But administrative interpretation of a statute contrary to language as plain as we find her is not entitled to deference. See Public Employees Retirement System of Ohio v. Betts, 492 U.S.158 [109 S.Ct. 2854, 10 L.Ed.2d 134] (1989). There is no indication that Congress was aware of the administrative

construction, or of the appellate decision at the time it revised the statute. Where the law is plain, subsequent re-enactment does not constitute an adoption of a previous administrative construction. Leary v. United States, 395 U.S. 6,24-25 [89 S.Ct. 1532, 1541-42, 23 L.Ed.2d 57] (1969).

When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.... We cannot say that the payment of witness fees to prisoners is so bizarre that Congress "could not have intended" it. [Quoting Griffin v. Oceanic Contractors, Inc., 458 U.S.564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982)].

--U.S. at --, 111 S.Ct. at 603-04

(footnote omitted).

As Collier, Nicklos Drilling, and Barger-our three most recent and only published opinions-demonstrate, we believe that the words of section 33 are unambiguous and therefore foreclose OWCP's contrary administrative interpretation. Yet, OWCP has raised two arguments that, if true, would introduce ambiguity concerning the congressional intent underlying section 33.

Turning to OWCP's first argument, we are unpersuaded that congressional desire to eliminate the financial hardship attendant on election of remedies necessitates an exception to section 33's approval requirement. First, the language of section 33 provides no exception to its approval requirement.

Second, section 33(g)(2) does expressly provide that LHWCA benefits "shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter". 33 U.S.C. Section 933 (g)(2) (1988) (emphasis added). This language squarely refutes OWCP's contention that Congress intended the actual payment of benefits to be a tradeoff for the right of prior approval. Third, OWCP's reading of section 33 is not necessary to prevent financial hardship to persons pursuing civil remedies. Section 33(a) expressly provides that persons entitled to LHWCA benefits need not make an election of remedies; rather, they may receive the LHWCA benefits while simultaneously

pursuing the civil remedy. To the extent that LHWCA claimants may choose to ignore their rights and responsibilities under section 33, Congress did not and cannot have intended to guard against such self-inflicted hardship.

We are also unpersuaded that OWCP's administrative interpretation is necessary to give meaning to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person." 33 U.S.C. Section 933(g)(2) (1988). While superficially persuasive, OWCP's argument does not stand careful scrutiny. First, the quoted phrase is necessary because it extends the notification requirement to judgments. Second, the quoted phrase requires that

the claimant notify the employer of any settlement or judgment whatever. As we note above, prior written approval is required only if, as Section 33(g)(1) provides, the amount of the settlement is "less than the compensation to which the [claimant] would be entitled under this chapter." Congress intended to require prior written approval in the limited circumstance where a claimant settles for an amount smaller than his LHWCA compensation entitlement. By contrast, only notification is required when a claimant receives a judgment or settles for an amount exceeding his LHWCA compensation entitlement. Congress's schemes of approval and notification dovetail perfectly; there is no ambiguity.

Conclusion

After carefully considering the permissibility of OWCP's administrative interpretation in light of the plain language of section 33, we conclude that Congress has spoken unambiguously and so as to leave no room for such embroidery. We therefore hold, in accord with the clear terms of the statute, that section 33's prior written approval requirement applies regardless of whether the employer or its carrier is paying LHWCA benefits at the time of settlement. By Chevron, there it ends. Accordingly, we AFFIRM our decision in Nicklos Drilling, AFFIRM our decision in Barger, and OVERRULE our earlier, unpublished decision in Kahny.

POLITZ, Circuit Judge, with whom KING and JOHNSON, Circuit Judges, join, dissenting.

I respectfully dissent. In 1984, as a member of an oral argument panel I authored the unpublished opinion in Kahny v. Arrow Contractors, 759 F.2d 777 (5th Cir.1984), (aff'd mem), in which we accepted the interpretation of the Director of the Office of Workers Compensation Programs, that the phrase "person entitled to compensation" as used in 33 U.S.C. Section 933(g) meant a person either receiving compensation benefits or the beneficiary of an ALJ award. I then considered such to be a proper interpretation of that statutory phrase; I am of the same opinion still.

The Director of the OWCP has so

interpreted the phrase in an untold number of cases. In his briefs the Director has detailed the reasoning behind the interpretation, including the statutory and legislative history of the parent legislation pertinent to the phrase. The Director advises that his conclusion is based not only upon that statutory and legislative history, but is informed by years of practical experience in administering the Longshore and Harbor Workers Act in many thousands of cases.

The majority rejects the Director's interpretation out of hand. I am not disposed to do so. Deference must be more than lip service. Deference presupposes deferring when one disagrees, otherwise there is no deference.

In this circuit we have recognized,

both en banc and in panels, that the construction placed on the Act by the Director is to be given the deference we are constrained to give an administrative agency. See, e.g., Boudreaux v. American Workover, 680 F.2d 1034, 1046 n. 23 (5th Cir.1982) (en banc); Alford v. American Bridge, 642 F.2d 807, 809 n. 2 (5th Cir. 1981).

I view the Director's construction of the subject phrase to be a reasonable one, given the statutory and legislative history of the Act. Early on a person injured on the job had to elect either to proceed under the Act or to seek recovery in tort. Congress deemed this too harsh and eliminated the election requirement. In its place it placed the consent and, later, notice requirements in the Act.

Both have a place in a comprehensive scheme which I perceive as just to all concerned. One need not elect but simultaneously may proceed in comp against the employer, while proceeding in tort against a responsible third party. If one does the latter and is receiving comp benefits from the former one must secure the employer's consent to settle if one is to preserve the right to receive comp payments in excess of the tort settlement. That is totally appropriate and fair because the employer is entitled to a credit for the sums recovered in tort in the instance of a job-related injury caused by a tortiously acting third person. But the requirement is not absolute.

Assume a not infrequent occurrence.

The employer denies owing compensation and refuses to pay. The employee seeks tort recovery from a third party. A settlement is offered. Why must the employee, who was denied comp, go hat in hand to the employer and request permission to settle his claim? Why should he? This query is not simply erecting a straw man. In one of the consolidated cases, Barger, we find the anomaly of the employer defensing a Jones Act claim by Barger's survivor by formally judicially claiming that it owed only LHWCA comp payments for Barger's accidental death, and then defensing the subsequent comp claim by insisting that the survivor had forfeited her comp claim because she did not get the employer's approval to settle the tort claim against a third-party tort

feasor.

I agree with the Director's long-standing construction that it is not reasonable to require an employee to secure the approval of the employer before making a tort settlement if the employer has declined to pay comp benefits. I can conceive of no valid purpose to be served by requiring otherwise other than to serve as the basis for forfeiture of a legitimate comp claim by an injured worker or the survivors of a deceased worker. The parties argue that the statute was amended to overrule the Director's erroneous interpretation. If that were so one would expect some small reference to such in the legislative history. There is none. There is no acceptable explanation offered for the

absence of such.

In 1984 the provision containing the phrase at issue was reenacted without change. Surely that ought to be some indication that the universal construction given the phrase by the Director, multiple ALJs, the Benefits Review Board, and several courts has received congressional approval. I am so persuaded.

Finally, the provision for notice added in 1984, section 933(g)(2) adds to the force of the Director's construction. The Act first provides for approval of the employer if comp is being paid. In the notice provision the Act goes on to require notification of a settlement or judgment, <u>whether comp is being paid or not</u>. To me this latter is to alert the employer and comp carrier of the

existence of an offset against any comp entitlement. It is a reasonable requirement to prevent double recovery. Nothing more.

I am convinced that the Director's interpretation in this instance is reasonable and I therefore respectfully dissent.

NICKLOS DRILLING COMPANY and
Compass Insurance Company
Petitioners

v.

Floyd COWART and Director, Office of
Workers' Compensation Programs, U.S.
Department of Labor, Respondents.

No. 89-4944
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 9, 1990.

Injured worker sought additional Longshore and Harbor Workers' Compensation Act (LHWCA) benefits. The Benefits Review Board affirmed the administrative law judge's award in favor of the employee, and appeal was taken. The Court of Appeals held that future LHWCA benefits must be denied employee who fails to obtain prior consent by

employer/carrier to settlement of his claim against third-party tort-feasor.

Vacated and remanded.

Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before GEE, DAVIS, and JONES, Circuit Judges.

PER CURIAM:

Today we reverse a decision of the Benefits Review Board as contrary to the unambiguous language of the Longshore and Harbor Workers' Compensation Act (LHWCA) and to what we had thought was the clear mandate of this Court. Because the Benefits Review Board (BRB) has refused to heed Congress's and our earlier beyond peradventure. We have in the past consistently held, and we now reaffirm,

that future LHWCA benefits must be denied an employee who fails to cbtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeasor. There are no exceptions to this rule: Congress enacted none, we engraft none, and we will tolerate the engraftment of none by the BRB in cases within our appellate jurisdiction.

FACTS and PRIOR PROCEEDINGS

Floyd Cowart was injured on July 20, 1983, on a Nicklos Drilling Company drilling right. The right was on a fixed offshore platform being operated by Transco Exploration Company. Mr. Cowart made a claim against NIcklos and its carrier for benefits under the LHWCA and filed suit against TRansco in Federal

District Court, seeking compensation for his injury. The carrier paid Cowart benefits for temporary total disability until May 21, 1984, when he was released to return to work. On July 1, 1985, without the written approval of Nicklos or its carrier, Cowart settled his third party claim against Ransco for a lump sum payment of $45,000.00

Thereafter, Cowart filed this claim against Nicklos and its carrier seeking additional LHWCA compensation. Nicklos and the carrier resisted, arguing that Cowart's failure to obtain their written approval to the settlement barred his recovery of additional LHWCA benefits. a The ALJ ruled in favor of Cowart, awarding him the difference between the amount prescribed by the Act for

permanent partial disability and the amount of the settlement. The Benefits Review Board affirmed. We reverse.

Discussion

The relevant section of the Longshore and Harbor Workers' Compensation Act provides as follows:

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

* * * * * * * *

(g) compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) this section only if written approval the settlement is obtained from employer and the employer's carrier before the settlement is executed, a by the person entitled to compensation (or the person's representative). The approval shall be

made on a form provided by the Secretary and shall be filed by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer andy settlement obtained from or judgment rendered against a third person all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether employer or the employer's insurer made payments or acknowledged entitlement to benefits under this circuit.

33 U.S.C. § 933 (emphasis added).

The underlined portion of the

above-quoted statute requires, in set terms and with qualification, exception or limitation, the person entitled to compensation obtain written approval both from his employer and from the employer's insurance carrier before entering into a settlement with a third person. A failure to comply with this requirement results in the forfeiture of their benefits under the LHWCA, in all cases.

We have faced this issue in the past, and we are convinced that we resolved it properly. In Petroleum-Helicopters, Inc. v. Collier we made clear that § 933's requirement that an employee and carrier for any settlement with a third party tortfeasor is "unqualified", and we declined to read into it a "waiver of subrogation"

exception. Petroleum Helicopters, Inc. v. Collier, 784, F.2d 644, 647 (5th Cir. 1986).

So that the BRB can be guided in its future decisions, and because we do not wish to again revisit the issue, we hold that there are no exceptions whatever to the "unqualified" language of § 933. Rather, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier ..." 33 U.S.C. § 933(g)(1) (emphasis added). In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning. Should Congress wish to give it another, it need only say so.

According, the Decision and Order of the Benefits Review Board is VACATED and this matter is REMANDED to the Administrative Law Judge for the entry of an order consistent with this opinion.

BRB No. 87-330

FLOYD COWART)
Claimant-Respondent)
)
v.)
)
NICKLOS DRILLING COMPANY)
)
and)
)
COMPASS INSURANCE COMPANY)
Employer/Carrier)
Petitioners)

DECISION AND ORDER

Appeal of the Decision and Order, the Order on Petition for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Parlen L. McKenna, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Seelig, Cosse, Frischhertz and Poulliard), New Orleans, Louisiana, for Claimant.

H. Lee Lewis, Jr. (Ross, Griggs & Harrison), Houston, Texas, for employer/carrier

Before: SMITH, Acting Chief Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order, the Order on Petition for Reconsideration and the Supplemental Decision and Order Awarding Attorney's Fees (85-LHC-2125) of Administrative Law Judge Parlen L. McKenna rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901, et seq., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. Section 1331, et seq., (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational and are in accordance with law. 33 U.S.C. Section 921(b)(3); O'Keeffe v. Smith,

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant was injured in the course of his employment on July 20, 1983, while working on a fixed platform operated by Transco Exploration Company. Claimant suffered injuries to his right hand and lost the distal half of his right thumb as a result of this incident. Claimant was off work from July 21, 1983 to May 21, 1984, when he was released to return to work with employer with a 40 percent permanent partial disability based on the loss of use of his right hand and thumb. Employer paid claimant temporary total disability benefits during this period. 33 U.S.C. Section 908(b). However it refused to pay claimant permanent partial disability benefits upon his return to

work. Claimant filed a civil suit in the United States District Court for the Eastern District of Louisiana, alleging that Transco, the third party and owner of the platform, was responsible for his injuries. Prior to trial, a settlement was reached between Transco and claimant on July 1, 1985 in which Transco agreed to pay claimant a lump sum of $45,000. Employer did not give its written approval of this settlement, but it did have notice of the settlement. Claimant subsequently filed this claim under the Act for a schedule award of permanent partial disability benefits based on the injuries to his right hand and thumb. Employer contended below that because it did not give written approval to claimant prior to the third party settlement,

claimant is barred under Section 33(g), 33 U.S.C. Section 933(g), from receiving any future compensation.

The administrative law judge found that Section 33(g) did not bar claimant's right to compensation under the Act. The administrative law judge noted that in Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir.1986), rev'g 17 BRBS (1985), the United States Court of Appeals for the Fifth Circuit held that the failure by an injured employee to obtain employer's prior consent to settlement of the employee's claim against a third party tortfeasor bars the employee's right to future benefits under the Act, including situations where the employer has contractually waived its subrogation rights

against the third party tortfeasor. The administrative law judge stated, however, that the court in Collier made no decision regarding what would occur where benefits were not being voluntarily paid by employer at the time of settlement, i.e., where one is not a "person entitled to compensation" under the Act. The administrative law judge noted that in O'Leary v. Southeast Stevedoring Co., 18 BRBS 25 (1986), the Board indicated that it is only in situations where employer is paying compensation either voluntarily or pursuant to an award that claimant is are required to obtain prior written consent for its third party settlement. The administrative law judge concluded that since in the instant case claimant was not receiving compensation from

employer at the time of settlement he was not a person entitled to compensation under Section 33(g)(1) of the amended Act and that employer's prior written approval was not required. 33 U.S.C. 933(g)(1)(Supp. V 1987). The administrative law judge further found that Section 33(g)(2), 33 U.S.C. Section 933(g)(2) (Supp.V 1987) did not bar the claim, as employer had notice of the settlement before it was effected. The administrative law judge therefore ordered employer to pay claimant permanent partial disability benefits of $6,242.17, or the difference between the amount of his past due compensation, $35,592.77, and his net recovery from the third party settlement, $29,350.60. 33 U.S.C. Section 907, ordered employer to

pay claimant interest in accordance with 28 U.S.C. Section 1961 on all past due benefits, and authorized claimant's counsel to submit a petition for an attorney's fee.

Following the issuance of the administrative law judge's Decision and Order, employer submitted a Motion for Recusal and Petition for Reconsideration of the administrative law judge's Decision and Order. (1) Regarding the petition for reconsideration, the administrative law judge reiterated his finding in his original Decision and Order, i.e., that since claimant was not a "person entitled to compensation", Section 33(g)(1) does not bar his right to compensation under the Act. Moreover, the administrative law judge

rejected employer's contention that he raised the issue of claimant's entitlement to future medical benefits sua sponte, thus causing prejudice to employer and violating its procedural due process rights, concluding that he had properly addressed the issue of future medical benefits. Lastly, the administrative law judge reaffirmed his findings granting interest and claimant's entitlement to an attorney's fee award. Claimant's counsel subsequently was awarded an attorney's fee of $4,125.74.

On appeal, employer contests the administrative law judge's findings with regard to Section 33(g), medical benefits, interest, and attorney's fees. Claimant responds, urging affirmance.

I. Section 33(g)

Employer contends that the administrative law judge's finding that Section 33(g) does not bar claimant's right to future compensation runs contrary to the Fifth Circuit's holding in Collier, supra. Employer challenges the administrative law judge's reliance on the fact that claimant was not a "person entitled to compensation", i.e., receiving voluntary payments at the time of settlement. Employer contends that the Fifth Circuit in Collier imposed an absolute requirement for written approval of third party settlements, and did not mention anything pertaining to a "person entitled to compensation". Employer further asserts that Collier involved a situation, like that in the instant case,

where the two employers had a contract containing an agreement to waive subrogation and to indemnify the potential third party tortfeasor. Finally, employer contends, the Fifth Circuit in Collier reviewed the changes made by the 1984 Amendments to Section 33(g) and concluded that the Act allows no exceptions to the written approval requirement.

We reject employer's contentions, as we agree with the administrative law judge that Collier may be distinguished from the instant case. In Collier, the claimant was receiving voluntary payments of compensation from the employer for injuries sustained in a work-related accident. Claimant sued a third party tortfeasor in Federal District Court, but settled this suit without the approval of

the employer or its carrier. The employer subsequently terminated its compensation payments. Claimant sought to have his disability benefits resumed, and the employer countered that claimant's failure to obtain its consent to the settlement eliminated its compensation liability. The administrative law judge rejected this contention, and the Board affirmed, agreeing with claimant that the employer's approval of the settlement was unnecessary as the employer had contractually waived all rights of subrogation against the third party. The Board also stated that Section 33(g) does not apply in cases where the employer waives its subrogation rights against a third party. Collier v. Petroleum Helicopters, Inc., 17 BRBS 80 (1985).

The employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, which reversed the Board's decision. Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986). The court framed the narrow issue before it as follows:

(D)oes the failure of an injured employee to obtain the prior consent of the employer/carrier to settlement of the employee's claim against a third party tortfeasor bar the employee's right to future benefits under the LHWCA when the employer/carrier has contractually waived their subrogation rights against the third party tortfeasor?

Collier, 784 F.2d at 645, 18 BRBS at 68 (CRT). The court held that although one

of the employer's interests in the settlement, that of recoupment of compensation benefits from the settlement proceeds, was absent under these circumstances, the employer retained an interest in the amount of its statutory offset under Section 33(f), 33 U.S.C. Section 933(f); therefore, claimant's failure to obtain the employer's prior written consent under Section 33(g) barred claimant's right to further compensation. Id., 784 F.2d at 646-647, 18 BRBS at 71 (CRT). See also Pinell v. Patterson Service, 22 BRBS 61 (1989).

As the administrative law judge found, the instant case is not factually similar to Collier, and the legal issues are not the same. Although, as in Collier, employer and Transco had a

waiver of subrogation agreement in this case, no one contends that fact renders Section 33(g) inapplicable. As the subrogation agreement, and that issue is not present here. Moreover, in Collier, employer voluntarily paid benefits at the time of the third party settlement. Thus, there was no dispute that Section 33(g) in 1984 with the addition of Section 33(g)(1) applied unless the waiver of subrogation agreement rendered it inapplicable. The changes made in Section 33(g) in 1984 with the addition of Section 33(g)(2) and their effects on claimants who were not paid benefits voluntarily or pursuant to an award were not before the court. (2)

Prior to the 1984 Amendments, the Board held that a claimant was a "person

entitled to compensation" within the meaning of Section 33(g), 33 U.S.C. Section 933(g)(1982) (amended 1984), if employer was paying benefits either voluntarily or pursuant to an award at the time of the third party settlement. See O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980). If claimant was not receiving benefits, Section 33(g) did not apply. See Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd mem., 729 F.2d 777 (5th Cir. 1984). At that time, Congress added Section 33(g)(2), which provides:

> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment

> rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.
>
> 33 U.S.C. Section 933 (g)(2)(Supp. V 1987).

In Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), the Board addressed the effect of the addition of Section 33(g)(2) on claimants who were not receiving any benefits at the time of a third party settlement. This section clearly applies regardless of whether employer has made any payments to claimant. However, it applies if no written approval is obtained as discussed in subsection (g)(1) or if the employee fails to notify the employer of any

settlement or judgment in a third party action. In Dorsey, in order to give effect to all parts of the statute, the Board concluded that where claimant is not a "person entitled to compensation," he is required to either obtain written approval or notify employer of the third party settlement. See also Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988); Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988). This construction of the statute protects employer's Section 33(f) lien interest by requiring that claimant, at a minimum, provide employer with notice of any settlement or judgment. See Mobley, supra.

As employer contends, the court's opinion in Collier contains language to the effect that there is no exception to

the written approval requirement of Section 33(g)(1). The court in Collier, however, did not address the case where claimant is not a "person entitled to compensation" or the notice provision of Section 33(g)(2). Under these circumstances, the administrative law judge found that employer had notice of the settlement at least three months before it was consummated. Accordingly, as the administrative law judge's finding that Section 33(g) does not bar claimant's entitlement to benefits is rational, supported by substantial evidence and is in accordance with law, we affirm his finding.

II. Interest

Employer contends that the administrative law judge's award of

interest on past due compensation payments runs contrary to 28 U.S.C. Section 1961, which it claims only allows interest to be paid on money judgments in civil cases in District Court. We reject this contention. While there is no provision in the Act providing for payment of interest on unpaid installments of compensation, the Board has held that interest awards are consistent with the congressional purpose of making claimants whole for their injuries. Santos v. General Dynamics Corp., 22 BRBS 226 (1989); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), modified on reconsideration, 17 BRBS 20 (1985). The Board relied on Section 1961 in Grant as guidance in establishing an appropriate rate of

interest. We therefore reject employer's contention that Section 1961 is not applicable to administrative tribunals, and we affirm the administrative law judge's award of interest on past due compensation.

III. Medical Benefits

Employer contends that the administrative law judge's award of future medical benefits was not based on the evidence contained in the record, and was raised sua sponte by the administrative law judge. Employer contends that it had insufficient opportunity to respond to the administrative law judge's order of May 14, 1986, in which he found that the issue of future medical benefits should be included for consideration in the

instant case, and that claimant submitted his brief without providing a copy of a certificate of service to employer.

We reject employer's argument. As the administrative law judge noted in his order on Petition for Reconsideration, he is permitted pursuant to 20 C.F.R. Section 702.336(a) (3) to include new evidence or issues not raised in the parties' pleadings, provided the parties are provided with fair notice. See Cornell University v. Velez, 856 F.2d 402, 21 BRBS 155 (CRT) (1st Cir. 1988). The administrative law judge noted in his Order on Petition for Reconsideration that claimant had initially raised the issue of his entitlement to future medical benefits at the hearing and had expressed his concern that such benefits

might not be forthcoming. The administrative law judge then issued an order in which he stated that although no discussion regarding the issue of future medical benefits was held at the hearing, and was not raised in the pleadings, he would consider the issue in view of claimant's "strong feelings" on the subject. (4) Order at 3-4. The administrative law judge then directed the parties to submit briefs addressing this issue within 30 days, and gave employer ten days to submit additional evidence in opposition to the grant of future medical benefits and to indicate whether it wanted an additional oral evidentiary hearing regarding the matter. As employer had an opportunity to address the issues, availed itself of this

opportunity and submitted a brief, its due process rights were not violated. Further, and administrative law judge can award future medical benefits for a work-related injury, but the services ultimately provided must be reasonable and necessary for the work-related injury. 33 U.S.C. Section 907; see generally Winston v. Ingalls Shipbuilding Inc., 16 BRBS 1007, rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1982). At such time when claimant applies for future medical expenses, employer may object to such treatment as the issue arises. We therefore affirm the administrative law judge's award of future medical benefits.

IV. Attorney's Fee

Employer lastly contends that the administrative law judge erred in awarding claimant's counsel an attorney's fee because it did not receive a copy of the fee petition. Employer also raises specific objections to itemizations in the fee petition. The administrative law judge awarded claimant's counsel an attorney's fee of $4,125.74 in his Supplemental Decision and Order Awarding Attorney's Fees. Employer objected to this award, however, alleging that it never received a copy of claimant's fee petition and was therefore unable to contest the award. The administrative law judge thereafter issued an Order Staying Attorney's Fees, in which he allowed employer an opportunity to review

claimant's fee petition and to make objections. However, the administrative law judge has not issued his final decision on the award of an attorney's fee and employer raises specific objections to the award before the Board.

Accordingly, the Decision and Order and the Order on Petition for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

Dated this 31st

day of October 1989

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(1) The administrative law judge denied employer's motion for recusal finding that it was without merit. Employer does not contest the administrative law judge's denial of its motion.

(2) The amended version of Section 33(g) applies to this case as it was filed after or pending on September 28, 1984, the effective date of the Longshore and Harbor Workers' Compensation Act Amendments of 1984. 1984 Amendments, Pub. L. No. 98-426, 98 Stat. 1639, 1655, Section 28(a).

(3) Section 702.336(a), 20 C.F.R. Section 702.336(a) states:

If, during the course of the formal hearing the evidence presented warrants consideration of an issue or issues not previously considered the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which

to prepare for it.

(4) The administrative law judge also noted that a conference call was held in which he informed the parties that he would subsequently issue and order regarding the matter.

In the Matter of

FLOYD COWART, Claimant	)	Case No. 85-LHC-2125
versus	)	
NICKLOS DRILLING COMPANY, Employer	)	OWCP No. 8-77392
COMPASS INSURANCE COMPANY, Carrier	)	

Doulgas M. Moragas,
Esquire For the Claimant

H. Lee Lewis, Jr.,
Esquire For the Employer/Carrier

Before: PARLEN L. McKENNA
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. (The Act), and the governing regulations thereunder, as extended to

cover certain employees under the Outer Continental Shelf Lands Act, 675 Stat. 462, 43 U.S.C. 1331 et seq. The claim was filed by Floyd Cowart, Claimant, against Nicklos Drilling Company, Employer, and Compass Insurance Company, Carrier. On July 18, 1985, this matter was referred for a formal hearing to the Office of Administrative Law Judges. The hearing was held in New Orleans, Louisiana, on April 29, 1986. Claimant's exhibits numbered 1 through 6 and Joint exhibit number 1 were admitted into evidence without objection.

During the hearing in this matter, questions were raised as to whether the Fifth Circuit's decision in Petroleum Helicopter, Inc., et al v. Collier, No. 85-4321 (March 10, 1986), barred the

Claimant's cause of action under Section 33(g) of the Act. The Employer's counsel took the position that since the Claimant had settled his third-party suit without the written consent of the Employer, a claim for compensation benefits is barred under the Longshore Harbor Workers' Compensation Act.

33 U.S.C. 901 et seq. Claimant's counsel indicated that absent a bar because of the third-party settlement, Mr. Cowart would have been entitled to $35,392.77 as a scheduled injury. Mr. Cowart's gross third party recover while amounting to $45,000.00 only netted him $29,350.60, after the deduction of attorney's fees and expenses. Thus, absent a bar, Mr. Cowart would have been entitled to $6,242.17 plus future medical

benefits if he prevailed in this case. Since neither party had anything further to present, the hearing was adjourned.

Issues

On May 14, 1986, the undersigned issued an Order directing the parties to submit briefs addressing the following issues within 30 days from the date of issuance of the Order:

(1) Whether the Claimant waived his right to permanent partial disability benefits under Section 8(c)(6) of the Act and to future medical benefits by settling a related third-party lawsuit without his employer's written consent; and

(2) Whether the Fifth Circuit's decision in Petroleum Helicopter, Inc., et al v. Collier, No. 85-4321 (March 10,

1986), overruled the Benefit Review Board's decisions in Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), and O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 611 F.2d 595 (9th Cir. 1980).

Consequently, these unresolved issues will be addressed in this Decision and Order.

Stipulations

At the outset of the hearing, the parties stipulated, and I so find:

1. That the parties are subject to the Act;

2. That Claimant and Employer were in an employee/employer relationship at the time of the injury;

3. That Claimant was injured on July 20, 1983.

4. That Claimant was in the course and scope of his employment;

5. That Claimant gave timely notice of the injury to Employer;

6. That Claimant filed a timely claim for compensation;

7. That Employer filed a timely notice of controversion of the claim;

8. That compensation benefits were paid to Claimant for temporary total disability from July 21, 1983 to May 30, 1984, at a rate of $364.68 per week for a total of $16,775.28 to date of hearing;

9. That Claimant's average weekly wage was $547.00;

10. That Claimant is now permanently partially disabled (40% to his hand);

11. That all medical benefits have been paid; and,

12. That at the time of the injury there was in effect a Platform Drilling Contract which provided for an agreement to hold harmless, waiver of subrogation and indemnification between the parties and those provisions were adhered to by the parties.

Facts

Claimant, a motorman, was employed by Nicklos Drilling Company, and at the time of the accident, was working on a fixed platform owned and Transco Exploration Company (Transco). On July 20, 1983, Claimant was laboring on Rig #81, located on the Outer Continental Shelf, when he sustained injuries to his right hand, when a mud tank crushed his hand during movement of the tank by a crane. Claimant also lost the distal half of his

thumb as a result of the accident. Following his injury, Claimant was treated by a series of physicians, including Frank X. Cline, Jr., M.D., an orthopaedic surgeon of Monroe, Louisiana. Claimant reached maximum medical improvement on May 21, 1984. At that time, Dr. Cline released Claimant to return to employment and assessed a 40% permanent partial disability based on the loss of the distal half of his thumb and residual synovitis in the flexor tendons.

Employer and its Carrier paid Claimant temporary total disability from July 21, 1983 through May 21, 1984, at the rate of $346.68 per week for a total of $16,775.28. Since Claimant had a scheduled injury under Section 8(c)(6) of the Act, once he reached maximum medical

improvement he was automatically entitled to 66 2/3 of his average weekly wage of $542.00 for a period of 75 weeks commencing May 22, 1984. The Department of Labor recommended Employer/Carrier to pay Claimant compensation based on his permanent partial disability rating. The record indicates that Employer/Carrier never made such payments. Finally, on April 22, 1985, the Deputy Commissioner corresponded to the Carrier noting that compensation in the amount of $35,592.77 plus 10% penalties and interest was due to the Claimant. Claimant filed suit in the United States District Court for the Eastern District of the Louisiana against Transco, the third party and owner of the rig, for its negligence in causing the accident. On July 1, 1985, Claimant

confected a settlement with Transco for $45,000.00 of which he netted $29,350.60 after the deduction of attorney's fees and expenses. Employer/Carrier did not give written approval of the settlement but had notice of the settlement, as is indicated by the record.

The findings of fact and conclusions of law which follow are prepared upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law.

Findings of Fact and Conclusions of Law

The threshold question to be resolved is whether Section 33(g) bars the Claimant's entitlement to (1) permanent partial disability and (2) future medical benefits. Fundamental to the first question is whether the Fifth Circuit's

decision in Collier, supra, overruled the Benefits Review Board decision in the Dorsey and O'Leary, supra. Claimant argues that Section 33(g) does not bar his recovery to compensation and future medical benefits pursuant to the Board's decisions in Dorsey and O'Leary, supra. Claimant argues that he is only required to obtain written approval from the Employer if he is receiving compensation. Since he was entitled to receive compensation for his scheduled injury after reaching maximum medical improvement, but the Employer withheld such compensation, he had no obligation to give written notice of the settlement to the Employer, relying on Dorsey's Section 33(g)(2) exception to the written notice requirement. (Also, see O'Leary,

supra).

On the other hand, the Employer/Carrier contend that since Claimant did not secure written approval of the third party settlement pursuant to Section 33(g) of the Act, he is barred from entitlement to $6,242.17, the difference between his net recovery and the outstanding compensation still due and from a right to future medical benefits. Relying on Collier, supra, the Employer/Carrier contend that both Sections 33(g)(1) and 33(g)(2) mandate that written approval be secured from the Employer. The Employer/Carrier further contend that there is no exception to the written approval requirement as suggested in Dorsey, supra.

If I find that the Employer/Carrier

position is correct, then the Claimant is barred from recovering compensation and future medical benefits. Accordingly, a determination, must be made regarding whether the Fifth Circuit in Collier intended to overrule the Board's decision in Dorsey.

In Collier, the Fifth Circuit began the opinion by noting that the question they had to answer was a narrow one: "does the failure by an injured employee to obtain the prior consent of the employer/carrier to settlement of the employee's claim against a third party tortfeasor bar the employee's right to future benefits under LHWCA when the employer/carrier has contractually waived their subrogation rights against the third party tortfeasor." After careful

examination of Section 33(g), the Fifth Circuit held, in pertinent part:

> There is nothing in the language of Section 933 to support a 'waiver of subrogation' exception to the unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third party tortfeasor. To the contrary, Section 933(g)(1) is brutally direct: 'the employer shall be liable for compensation. . . only if written approval of the settlement is obtained from the employer and the employer's carrier' (emphasis added).

Thus, the Fifth Circuit held in Collier that where an employee is a "person entitled to compensation" under the Act, nothing in Section 33(g) supports a "waiver of subrogation" exception to the unqualified requirement that an employee obtain written consent for settlement with a third party

tortfeasor. The underlying public policy rationale for that position is:

> to ensure that employer's rights are protected in a third party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. 933(b)-(f). Collier v. Petroleum Helicopters, Inc., 17 BRBS 80, 82 (1985). See also Dorsey, supra, at 27, 28.

However, the Collier decision did not rule on the issue of where benefits are not being paid, and the claimant is not a "person entitled to compensation" under the Act. Indeed, the O'Leary court, which was affirmed by the Ninth Circuit of Appeals, specially addressed and inequity of applying the presumption in a case such as the one at bar:3

The Act is clearly written with the underlying concept that the employer upon

being informed of an injury will voluntarily begin to pay compensation. See 33 U.S.C. Section 914(a). The provisions of Section 33 similarly contemplate either payments being made voluntarily or pursuant to an actual award. Section 33(g) which requires the consent of the employer to the third party settlement refers to Section 33(f) which indicates that in cases of third party settlement, the employer's liability to the claimant is for those sums in excess of that gained in the third party settlement, the very language contemplating that employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination. Moreover, Section 33(b) provides:

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

This provision clearly implies an employer's rights under Section 33 derive solely from their making either voluntary payments under the Act or pursuant to an award.

Only where an employer voluntarily pays compensation or where an award is entered against the employer does it make sense to require written consent by employer to the third party settlement. To find otherwise could severely prejudice a claimant's rights.

Several reasons support this

interpretation. First, the legislative history of the 1984 Amendments indicates no congressional intent to overrule O'Leary. The 1984 Amendments did not alter the language in the 1972 Act now found in subsection (g)(1), which states that this provision only applies to a "person entitled to compensation." Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt the interpretation when it re-enacts a statute without change. Lorillard v. Pons, 434 U.S. 574, 580-81 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 N.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951).

Second, this interpretation gives meaningful effect to the phrase "or if

the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person" contained in subsection 33(g)(2). In construing a statute, a judicial body is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); U. S. v. Menasche, 348 U.S. 528, 538-39 (1955). A basic rule of construction is that a statute should be interpreted so as not to render one part inoperative. Colautti v. Franklin, 439 U.S. 379, 393 (1979). If subsection (g)(2) were interpreted to require written notice regardless of whether claimant was receiving compensation at the time of the third party settlement, as employer argues, the phrase requiring notice of

any settlement of judgment would be rendered superfluous since the written approval requirement makes any additional notification unnecessary. See Colautti, supra. Under this analysis, however, claimant must give notice to employer if he is not receiving compensation. Consequently, notice along is sufficient where the claimant is not "entitled to compensation" under subsection 33(g)(1).

Finally, this conclusion that claimant need obtain written approval of a third party settlement only when he is "entitled to compensation" is consistent with policy concerns. The Act should be construed in order to further its purpose of compensating longshoremen and harbor workers "and in a way which avoid harsh and incongruous results." Voris v.

Eikel, 346 U.S. 328, 333 (1953); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 268 (1977). If Section 33(g) was applied as employer argues, the result would be harsh and unfair. There would be no means to protect claimant against the withholding of consent by employer or its insurer in a meritorious case. In any case in which a settlement was entered into for an amount less than the compensation to which claimant would be entitled under the Act, employer would only need to withhold its written approval of the settlement thereby avoiding the payment of compensation under the Act. The purpose of Section 33(g) can be satisfied by the less restrictive approach adopted in this opinion. See Devine v. National

Creative Growth, Inc., 16 BRBS 147, 154 (1982) (Opinion of Ramsey, C.J., dissenting).

Indeed, if a claimant was injured through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e.g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make

a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money (the Act providing no procedure for waiving employer's consent unlike some state acts). Surely, Congress by requiring written consent could not have contemplated such a result. O'Leary, supra, at 147-149.

The Board's interpretation in Dorsey of the amended Section 33(g) follows:

> Employer contends that the phrase 'regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act,' inserted at the end of subsection 33(g)(2), overrules O'Leary4 and that compensation is therefore

barred in this case regardless of the timing of the settlement. We reject this contention. We do not view this new phrase in subsection 33(g)(2) as modifying the written approval requirement of subsection 33(g)(1). Rather, we view subsections 33(g)(1) and 33(g)(2) of the amended Act as separate provisions applicable to separate situations.

Under subsection 33(g)(1), the employer's written approval of a settlement must be obtained where employer is paying compensation as stated in O'Leary. Under subsection 33(g)(2), regardless of whether employer has made payments or acknowledged entitlement (i.e., where O'Leary does not apply), the employer must at a minimum be given notice of a settlement; written approval is not required. Thus, the statute as interpreted in O'Leary is re-enacted in subsection 33(g)(1), and an additional notice requirement in cases where the claimant is not 'entitled to compensation' under subsection 33(g)(1) is enacted in subsection 33(g)(2).

In this case, it is clear that at the time of the settlement with Transco,

Claimant was not receiving compensation. Therefore, Claimant was not a "person entitled to compensation" under 33(g)(1) (emphasis added). Accordingly, the provisions of 33(g)(2) are applicable to the facts of this case. Under subsection 33(g)(2), the employer/carrier must be given notice of the settlement; written approval is not required. The record indicates that the Employer/Carrier had notice of the settlement at least 3 months before it was confected. The fact that Employer/Carrier's written approval was not obtained is therefore irrelevant.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I make the following compensation Order. The specific dollar computations of the compensation award shall be

administratively performed by the Deputy Commissioner. Interest as hereinafter provided in the Order is applicable to all past due weekly installments of compensation.

ORDER

Therefore, it is the ORDER of the Administrative Law Judge that:

1. Employer/Carrier shall pay the Claimant $6,242.17, the difference between the amount of his past due compensation ($35,592.77) and his net recovery from the third party settlement ($29,350.60).

2. Employer/Carrier shall pay for all future medical benefits related to the Claimant's July 20, 1983 injury.

3. Employer/Carrier shall pay to the Claimant interest in accordance with

28 U.S.C. 1961 on all past due benefits outstanding.

4. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

Dated: November 25, 1986

New Orleans, Louisiana

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1. Under these provisions, employer is entitled to credit the proceeds of a third party settlement or judgment in a suit brought by claimant or employer, against employer's liability for compensation under the Act.

2. While the Collier decision contained language which could be construed as supporting the Employer's position, such dicta is not controlling. Moreover, there was no discussion of either the Dorsey or O'Leary cases by the Fifth Circuit in Collier. Thus, it does not follow that the Court would expand

its holding in Collier to cover the facts presented here. Under this circumstance, I am constrained to follow and fully support the Dorsey rationale.

3. The fact that Section 33(g) was subsequently amended has no affect on the legal or public policy analysis herein.

4. In O'Leary, the Board interpreted the language "person entitled to compensation" as indicating that Section 33(g) bars compensation only when employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. See also Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982) (Ramsey, C.J., concurring in result), aff'd mem, 729 F.2d 757 (5th Cir. 1984); Caranate v. International Terminal Operating Co., 7 BRBS 248 (1977).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 83-4104

EDNA KAHNY, (Widow of Don Kahny)
Petitioner,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and ARROW CONTRACTORS OF JEFFERSON, INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

No. 83-4109

ARROW CONTRACTORS OF JEFFERSON, INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and EDNA KAHNY, Respondents.

Petitions for Review of an Order of the Benefits Review Board

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Before POLITZ, RANDALL and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

These consolidated petitions, brought pursuant to § 21(c) of the Lonshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 921 (c), seek review of the final order of the Benefits Review Board (BRB), affirming the compensation award by an administrative law judge, in Kahny v. Arrow Contractors, Inc., 15 BRBS 212 (1982). Edna Kahny petitions for review, as does Arrow Contractors of Jefferson, Inc. and its compensation insurer, Liberty Mutual Insurance

Company. We modify the award and affirm.

FACTS

Don Kahny was accidentally killed on February 22, 1979, while working for Arrow on a fixed platform on the outer continental shelf off the coast of Louisiana. Shortly thereafter, Edna Kahny, Don Kahny's widow, filed a claim for compensation benefits under the LHWCA, as extended by the Outer continental Shelf Lands Act, 43 U.S. C. § 1333(b). At the same time, she filed a tort action against the owner of the platform and the owners of the drilling rig. Arrow controverted Edna Kahny's right to receive death benefits, contending that she id not qualify as a "widow" under § 9(b) of the LHWCA, 33

U.S.C. § 909(b). After some delay, Liberty Mutual paid Edna Kahny $1,500, in reimbursement of a portion of the funeral expenses she had incurred.

After approximately ten months, ill, unable to work, an in dire financial straits because of the loss of her husband's income, Edna Kahny authorized her attorneys to settle her tort claim for $125,000. her net recovery, after deduction of attorney's fees, was $83,333.34. Because of her financial difficulties, Edna Kahny's attorney had advanced approximately $4,000 to cover her living expenses. She repaid this loan after she received her settlement proceeds.

Twenty months after the death of Don Kahny, an ALJ heard Edna Kahny's LHWCA

claim. The threshold issue was either Edna Kahny was the "widow" of Don Kahny within the intendment of the LHWCA. The ALJ allowed Arrow and Liberty Mutual an offset of the net amount received by EDna Kahny. He also allowed a credit for the $4,000 advanced by her attorneys. On appeal, the BRB affirmed the ALJ's award in its entirety.

ASSIGNMENTS OF ERROR

Arrow and Liberty Mutual contend that the ALJ and BRB erred in finding that Edna Kahny was entitled to a widow's benefits. They further contend that the ALJ and BRB erred in rejecting their defense under § 33(g) of the Act, 33 U.S. C. § 933(g). Specifically, Arrow and Liberty Mutual maintain consent, Edna

Kahny forfeited all compensation benefits.

Edna Kahny contends that because of its unjustified refusal to pay compensation benefits, Arrow should not be allowed an offset. Alternatively, she contends that the $4,000 advanced her attorneys should not be added to the amount of her net recovery in determining the offset total.

The Director of the Office of Workers' Compensation Programs, United States Department of Labor, maintains that the Arrow has no standing to invoke the bar of § 933(g) because Arrow waived the very subrogation rights that the section is designed to protect and because Arrow indemnified the platform owner from the tort claims brought by Edna Kahny.

Although the Director recognized that our decision in Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Circ. 19809), is binding precedent for this panel, he questions the soundness of the decision and hopes for its ultimate reconsideration.

DISCUSSION

1. Is Edna Kahny a "widow" under LHWCA?

Only a decedent's widow is entitled to receive death benefits under the LHWCA. Section 2(16) of the Act, 33 U.S.C. § 902(16), defines widow, in pertinent part, as "the decedent's wife . . . living with or dependent for support upon him . . . at the time of his . . . death; or living apart for justifiable cause . . . ."

The ALJ found that Don and Edna Kahny

were husband and wife and were living apart for justifiable cause at the time of Don Kahny's death. WE are bound to uphold the factual findings made by the ALJ if they are supported by substantial evidence in the record considered as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

The record before us abounds with support the for ALJ's findings. Edna and Don Kahny were married in 1971. They lived together in North Carolina until Labor Day 1978 when Don Kahny departed for Cameron, Louisiana to seek employment in the offshore oilfields. Edna Kahny visited her husband in October 1978, staying with him at a motel in which he was temporarily living. She then returned to North Carolina to stay with

her mother until her husband was able to secure a suitable home. In December 1978, Don Kahny found a mobile home in Port Arthur, Texas. Moving plans were made. On February 28, 1979, Don Kahny was to use a U-Haul trailer to move his wife and step-daughter, if she so chose, to their new home. Don Kahny's death aborted these plans. Between September 1978 and February 22, 1979, Don Kahny sent his wife money in amounts commensurate with his earnings, and the couple corresponded regularly by telephone and letters. The record includes no evidence of significant marital discord.

It is apparent that the ALJ's finding is supported by substantial evidence. The Kahnys' temporary physical separation

did not break the "conjugal nexus" required by Thompson vs. Lawson, 347 U.S. 334 (1954).

2. Was Edna Kahny a "person entitled to compensation?"

The second issue presented was whether Edna Kahny was a "person entitled to compensation" under 33 U.S.C. § 933(g), which provides:

> "If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such

> <u>representative at the time of or prior to such compromise</u> on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made

(emphasis added). Although it is undisputed that Kahny neither obtained Arrow Contractors' prior written approval of her out-of-court settlement nor filed the proper form with the deputy commissioner, the BRB held that § 933(g) did no bar Kahny's right to compensation because, at the time of the settlement, Arrow Contractors was making no weekly benefits payments to Kahny, either voluntarily or pursuant to an ALJ's award. In <u>O'Leary v. Southeast Stevedoring Co.</u>, 7 BRBS 144 (1977), <u>aff'd</u>

<u>mem</u>, 622 F.2d 595 (9th Cir. 1980), the BRB held tha a claimant is a "person entitled to compensation" within the meaning of § 933(g) only if at the time of the settlement the employer is making weekly benefits payments either voluntarily or pursuant to an ALJ's award. Based upon its view that "the very language [of § 933(g)] contemplate[es] the [the] employer either be making voluntary payments under the ACt of [be] found liable for benefits by a judicial determination," 7 BRBS at 148, the BRB concluded that to apply the bar of § 933(g) to a situation in which the employer is not making weekly benefits payments at the time of the settlement

> could result in a claimant not being paid any compensation, yet the claimant would be afraid to

> make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . .
>
> 7 BRBS at 149.

We find this analysis fully consistent with the language, legislative history, and rational of § 933(g). The critical time for the determination whether on is a "person entitled to compensation" is the time of the challenged settlement. If, at that time, the employer is not making voluntary payments and no award has been ordered by an ALJ, the claimant is not a "person entitled to compensation" under § 933(g), and is not obliged to secure prior approval for a third-party tort settlement.

3. What is the effect of the payment of funeral benefits?

In the instant case Liberty Mutual reimbursed Edna Kahny $1,500.00, as required by 33 U.S. C. § 909(a), in partial payment of the funeral expenses. In the board sense, compensation includes the funeral expense allotment, but this is not the meaning of compensation eyes used in 33 U.S. C. § 933(g). Thus, there is no merit to Arrow's contention that the $1,500.00 funeral expenses draft magically converted Edna Kahny into a "person entitled to compensation" at the very time her right to receive compensation benefits was being denied by Arrow and Liberty Mutual. We are not persuaded by that legal legerdemain. Section 933(g). Section 933(g) presents

no bar to Kahny's recovery.

Having concluded that Edna Kahny was not a person entitled to compensation under § 933(g), we need not address the issue of Arrow's standing to assert the forfeiture provisions of that section. The Director maintains that since Arrow waived its subrogation rights and, further, agreed to indemnify the platform owner for any claims made by or on behalf of its employees, it should not be allowed to raise the shield of § 933(g). We defer the resolution of that question to another panel on another day.

4. Is Arrow entitled to offset the amount of Kahny's tort settlement?

Edna Kahny asserts that the BRB erred in setting off the net amount of the third-party settlement, claiming that the

waiver of subrogation rights against the platform owner precluded Arrow from reaping the benefits of the setoff provision of 33 U.S.C. § 933(f). We do not agree. That section provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

5. Amount of Offset:

The ALJ and BRB erred in computing the amount of offset. There is no evidence to support the allowance of a credit for the $4,000 which the attorney made available to Edna Kahny to ease the financial distress occasioned by the

death of her husband, as compounded by the failure and refusal of the employer and compensation carrier to pay timely a widow's benefits. In fact, the parties stipulated the amount of net recovery and that stipulation should have been taken as conclusive. The award is modified to delete that portion of the offset, thus allowing a total offset of $83,333.34.

The final order of the BRB, as modified herein, is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Claim for Compensation under the Longshoremen's and Harborworker's Compensation Act)

MARY V. O'LEARY, NO. 78-1339)

Claimant-Respondent,)

v.)

SOUTHEAST STEVEDORE COMPANY MEMO- and LIBERTY MUTUAL INSURANCE COMPANY,)

Petitioners,)

v.)

BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR,)

Respondent.)

Petition to Review a Decision of the Benefits Review Board

Before: SKELTON,* Judge, and FARRIS and PREGERSON, Circuit Judges.

*The Honorable Byron G. Skelton, sitting by designation.

Southeast Stevedore Company and Liberty Mutual Insurance Company appeal the decision of the Benefits review Board awarding death benefits to Mrs. O'Leary under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. Southeast contends that because Mrs. O'Leary accepted a settlement and released her rights against Ketchikan Pulp Company, Section 33 (g) of the Longshoremen's Act, 33 U.S.C. Section 933 (g), barred her claim for the otherwise allowable death benefits. The Benefits Review Board held that Section 33(g) was not applicable for two reasons: 1) there was no final order awarding Mrs. O'Leary death benefits under the Act as the time she settled her

third party claim, and 2) prior to the settlement, Southeast had refused to voluntarily pay Mrs. O'Leary compensation pending adjudication of her claim for death benefits under the Act.

Our scope of review is limited. We will uphold the Board's interpretation of the Longshoremen's Act if those interpretations are reasonable and reflect the policy of the Act. National Steel & Shibuilding Co. v. United States Dept. of Labor, 606 F.2d 875, 880 (9th Cir. 1979).

Section 33(g) provides:

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as

> determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.
>
> 33 U.S.C. Section 933(g).

The Board reasoned that "the very language [of Section 33(g)] contemplat [es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." 7 BRBS 144, 148 (1977). The Board concluded that a different interpretation,

> could result in a claimant not being paid any compensation, yet the Claimant would be afraid to

> make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . .
>
> 7 BRBS 144, 149 (1977).

Here, Southeast 1) never paid compensation voluntarily or pursuant to an award and 2) disclaimed any interest in Mrs. O'Leary's third party claim even though fully aware of the proposed settlement.

The dominant purpose of the Longshoremen's Act is to aid injured longshoremen and their dependents. Reed v. The Yaka, 373 U.S. 410 (1963). The Board's ruling is reasonable and furthers the underlying purpose of the Act.

Affirmed.

LEGISLATIVE HISTORY

The Bureau of the Budget has advised that there would be no objection to the submission of this legislative proposal to Congress.

Sincerely yours,

ARTHUR E. SUMMERFIELD,
Postmaster General.

HARBOR WORKERS - COMPENSATION-THIRD PARTY LIABILITY

For text of Act see p. 426

Senate Report no. 428, June 24, 1959 [To accompany H.R. 451]

House Report No. 229, Mar. 19, 1959 [To accompany H.R. 451]

The Senate Report No. 428

The Committee on Labor and Public Welfare, to whom was referred the bill (H>R. 451) to amend the Longshoremen's

and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

BACKGROUND OF THE BILL

Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under

the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer of the exclusive liability for injury to an employee arising out of employment. This section also reserves to the employee the right to recover damages against third parties causing injury.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment. This section also reserves the employee the right to recover damages

against third parties causing injury.

However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works on hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not

months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit--those who, in effect, purchases an injured employee's claim for their own monetary advantage.

PURPOSE OF THE BILL

The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation law.s The committee believes that in theory and practice this

is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and right of all who are involved.

Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee received four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. Thus by giving the employer a reasonable (one-fifth) share in the net

recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible.

The other major provision of the bill relates to the immunization of fellow employees against damage suits. The rational of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that the might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow

worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

The bill as amended by the committee provides greater protection to injured workers and corrects defects in existing law. It carefully protects the interests of all who are involved and balances the equities. The bill as amended has the support of both labor and industry and the endorsement of both the Labor Department and the Bureau of the Budget. The views of the executive agencies are expressed in the letters which follow:

U.S. Department of Labor.
Office Of The Secretary
Washington, May 1, 1959.

Honorable Lister Hill,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

Dear Senator Hill:

This is in further response to your request for a report on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

This bill would amend section 33 of the act, which describes the relative rights of employers and employees under the act when a third party is responsible for ran injury which is also compensable under the act. The primary purpose of the bill apparently is to eliminate the

present requirement of an immediate election either to take benefits under the act or to pursue a remedy against the third party. Under certain circumstances, it would permit acceptance of compensation benefits and an action by the employee or his representative against the third party. On the other hand, if compensation were accepted without instituting an action against the third party within the period allowed in the bill, the cause of action would be assigned to the carrier after it had given the required notice. Two-thirds of any amount recovered by the carrier in excess of its compensation liability, after the deduction of reasonable expenses, would be payable to the employee of his eligible survivors.

In general, H.R. 451 appears to follow the pattern of the New York workmen's compensation law and would make significant changes with respect to the rights and liabilities of the parties in interest. This Department would not object in principle to what seems to be the primary purpose of the bill. However, it has several features which we find objectionable, for the reasons described in the enclosed comments on H.R. 451. We are enclsoing, as a substitute for H.R. 541, suggested language to remedy these defects. Also enclosed is a Ramseyer of the Department's amendment, and an explanation of this proposal.

Time has not permitted us to determine the views of the Bureaus of the

Budget on the submission of this report.

Sincerely yours,

JAMES T. O'CONNELL,
Acting Secretary of Labor.

Executive Office Of The President,
Bureau Of The Budget,
Washington, D.C., May 22, 1959.

Honorable Lister Hill,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in reply to your letter of April 17, 1959, requesting the views of the Bureau of the Budget on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

As an attachment to its report,

forwarded to your committee on May 1, 1959, the Department of Labor has submitted a substitute for H.R. 451 which accomplishes the major purpose of that bill while correcting certain of its features which were found to be objectionable.

The Bureau of the Budget concurs with the views of the Department of Labor and prefers enactment of the substitute bill proposed by that Department instead of H.R. 451.

Sincerely yours,

(Signed) PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.